PILLSBURY WINTHROP SHAW PITTMAN LLP
ALBERT J. BORO, JR. (CA Bar No. 126657)
albert.boro@pillsburylaw.com
FUSAE NARA (*pro hac vice*)
fusae.nara@pillsburylaw.com
TARA M. DESAUTELS (CA Bar No. 191336)
tara.desautels@pillsburylaw.com
RYAN G. KRIGER (*pro hac vice*)
ryan.kriger@pillsburylaw.com
50 Fremont Street
San Francisco, CA 94105
Telephone: (415) 983-1000
Facsimile: (415) 983-1200

Attorneys for Defendants
SHARP CORPORATION and
SHARP ELECTRONICS CORPORATION

[Additional moving defendants and counsel listed on signature pages]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE: TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION	Master File No. M:07-1827 SI MDL No. 1827
This Document Relates To: ALL DIRECT ACTIONS	**DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF JOINT MOTION TO DISMISS DIRECT PURCHASER PLAINTIFFS' CONSOLIDATED COMPLAINT** Date: April 30, 2008 Time: 2:00 p.m. Place: Courtroom 10, 19th Floor Judge Hon. Susan Illston

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Page

Cases

Rules and Regulations

INTRODUCTION

Direct Plaintiffs have failed to show why their consolidated complaint does not fail as a matter of law on numerous grounds. For the reasons set forth in Defendants' moving papers and reply briefs, the DP-CC should be dismissed.

First, Direct Plaintiffs' Opposition fails to demonstrate the DP-CC has alleged sufficient "evidentiary facts" to support the plausible inference of an antitrust conspiracy required by *Bell Atlantic Corp. v. Twombly,* 127 S.Ct. 1955 (2007), and the Ninth Circuit's recent decision in *Kendall v. Visa U.S.A., Inc.*, No. 05-16549, 2008 WL 613924 (9th Cir. Mar. 7, 2008). Plaintiffs do not dispute the DP-CC's conclusory assertions of "agreement" fail to provide "fair notice" of their claims, nor do they address that the DP-CC fails even to allege parallel conduct by Defendants. And although Plaintiffs now seek to disparage them as "counter facts," Plaintiffs do not seriously dispute the only "evidentiary facts" alleged by the DP-CC show only a normal pattern of competitive business cycles overlaying a deep drop in prices during a period of exploding demand. Finally, Plaintiffs recycle a few truncated public statements by a few Defendants and refer vaguely to certain government investigations, but the statements (made at the end of the putative eleven-year conspiracy) permit inferences equally, if not more, consistent with independent action, and the investigations are a "non-factor" in pleading an antitrust conspiracy under the settled law of this District.

Second, Direct Plaintiffs' conclusory allegations fail to establish standing under *Assoc. Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983) ("AGC"). The purchasers of finished goods containing TFT-LCD panels are not participants in the allegedly restrained market for TFT-LCD panels, and the DP-CC's conclusory allegations of antitrust injury are insufficient as a matter of law for pleading standing. The other AGC factors also counsel against standing. Finally, Plaintiffs' reliance on *Illinois Brick* cases to argue the AGC standing issues is misguided.

Third, Direct Plaintiffs cannot evade the statute of limitations. A plaintiff on inquiry notice must have diligently investigated his or her claim to assert fraudulent

concealment and toll the statute of limitations. The DP-CC relies on "facts" readily available to Plaintiffs throughout the alleged class period and asserts that these "facts" sufficiently state a claim under *Twombly* – it cannot also be true that the same publicly available information failed to even arouse a suspicion to put Plaintiffs on inquiry notice. Where the allegations upon which Plaintiffs rely were gleaned from public sources available throughout the period at issue but Plaintiffs did nothing to investigate that publicly available information, tolling must be denied as a matter of law.

ARGUMENT

I. PLAINTIFFS MISCHARACTERIZE THE *TWOMBLY* PLEADING STANDARD.

The DP-CC does not allege facts sufficient to satisfy the pleading standard for a Section 1 conspiracy set forth in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007). Plaintiffs do not deny the DP-CC fails to support its assertions of "agreement" with any "evidentiary facts" necessary to provide "fair notice" of their claims. Instead, plaintiffs mischaracterize *Twombly* and the cases applying it in an apparent effort to minimize the factual showing *Twombly*'s "plausibility" standard demands to support an inference of illegal collusion.

Kendall v. Visa – which plaintiffs largely ignore – emphasizes *Twombly*'s "plausibility" standard has two fundamental implications for pleading a section 1 conspiracy. 2008 WL 613924, at *3-*4.[1] *First*, a plaintiff may no longer avoid dismissal

[1] *Kendall* also holds that "[a]t least for the purposes of adequate pleading in antitrust cases, [*Twombly*] specifically abrogated the usual 'notice pleading' rule, found in Rule 8(a)(2)" and *Conley v. Gibson*, 355 U.S. 41 (1957). *Id.* at *8 n.5 (quoting *Twombly*, 127 S.Ct. at 1964). Accordingly, *Kendall* necessarily limits reliance on Judge Wilken's recent *SRAM* ruling, decided before *Kendall* and without its guidance. *See In re Static Random Access Memory (SRAM) Antitrust Litig.*, No. M:07-cv-01819 CW, 2008 WL 426522, at *3 (N.D. Cal. Feb. 14, 2008) (citing Fed. R. Civ. P. 8(a) as standard).

by alleging "ultimate facts," such as "'conspiracy,' or even 'agreement,'" but must "plead the necessary *evidentiary* facts to support those conclusions." *Id.* at *3. Thus, if a Section 1 claim rests on an allegation of the "ultimate fact" of agreement, the complaint must allege sufficient "evidentiary facts" to "answer the basic questions: who, did what, to whom (or with whom), where, and when?" *Id.* at *3-*4; MTD DP-CC at 9 & n.7 (citing cases).

Second, where a plaintiff asserts a Section 1 conspiracy by alleging parallel conduct and other circumstantial evidence, *Twombly* requires a court both to ask whether those allegations allow competing inferences equally suggestive of collusion or independent action, and – despite plaintiffs' argument to the contrary – to resolve ambiguities in *defendant's* favor. *Kendall*, 2008 WL 613924, at *5. *Kendall* holds that "[a]llegations of facts that could just as easily suggest rational, legal business behavior by the defendants as they could suggest an illegal conspiracy are insufficient to plead a violation of the antitrust laws." *Id.* (citing *Twombly*, 127 S.Ct. at 1964-66 & n.5). Accordingly, a court must ask whether there is "an obvious alternative explanation" other than collusion for the alleged conduct. *Twombly*, 127 S.Ct. at 1972.[2]

Plaintiffs try to deflect *Twombly* and *Kendall* by suggesting neither involved "classic Section One allegations." Dir. Opp. at 14. But *Twombly*, 127 S.Ct. at 1963, involved an alleged horizontal agreement to allocate customers and markets, and *Kendall*, 2008 WL 613924 at *4, an agreement to set prices, both "long … recognized as [] classic *per se* violation[s]." *Twombly*, 127 S.Ct. at 1974 (Stevens, J. dissenting). Plaintiffs also incorrectly claim the *Twombly* complaint offered only "bare-bone conclusory allegations of parallel conduct." Dir. Opp. at 5. But as explained (MTD DP-CC at 5-7), that complaint included detailed factual allegations demonstrating "parallel conduct unfavorable to

---

[2] Citing *Flying J Inc. v. TA Operating Corp.*, No. 1:06CV00030 TC, 2007 WL 3254765, at *1 (D. Utah Nov. 2, 2007) and *SRAM*, 2008 WL 426522 at *4, Plaintiffs erroneously argue that "under Rule 8, all competing inferences must be drawn in a plaintiff's favor" (Dir. Opp. at 20), but neither case involved merely circumstantial allegations that only supported equal inferences of either collusion or independent action. Unlike here, both included detailed allegations of parallel conduct plus explicit allegations of direct communications between competitors specifically regarding the alleged conspiracy.

competition." *Twombly*, 127 S.Ct. at 1961. The Supreme Court found the complaint lacking not because plaintiffs offered only conclusory allegations of parallel conduct, but because the many detailed factual allegations (as opposed to assertions of "ultimate facts" or conclusions) showed *only* parallel conduct and failed to provide further "factual context suggesting agreement." *Twombly*, 127 S.Ct. at 1961.

Plaintiffs also fail to distinguish Defendants' cases applying *Twombly* to dismiss Section 1 claims based on more extensive factual allegations than plaintiffs allege here. *See* MTD DP-CC at 7-8. For example, plaintiffs argue the *In re Elevator Antitrust Litig.*, 502 F.3d 47 (2d Cir. 2007), complaint contained only "conclusory averments of a conspiracy" (Dir. Opp. at 7), but that complaint included allegations far more detailed and consistent with the purported conspiracy than any plaintiffs offer here.[3] As in *Twombly*, the Second Circuit affirmed dismissal because the factual allegations purporting directly to show agreement were insufficiently specific as to each defendant, *In re Elevator Antitrust Litig.*, 502 F.3d at 50-51, and the substantial allegations of circumstantial evidence were no more suggestive of collusion than independent action, *id.* at 51.

Nor can plaintiffs distinguish *In re Graphics Processing Units Antitrust Litig.*, 527 F.Supp.2d 1011 (N.D. Cal. 2007) ("*GPU I*") by noting the amended complaint survived in *In re Graphic Processing Units Antitrust Litig.*, No. C 06-07417 WHA, 2007 WL 3342602,

---

[3] The *Elevator* complaint alleged, *inter alia*, (i) agreements to fix price, allocate markets, and rig bids; (ii) specific meetings in Europe and the United States to discuss prices for elevators and maintenance contracts; (iii) agreements made at such meetings; (iv) exchanges of specific price quotations and other competitive information; (v) a highly concentrated industry where four defendants held 75% of the market; (vi) a historically close-knit industry where many top executives had personal ties and frequently attended the same "industry, trade association, and social functions," enabling exchanges of information; (vii) adoption of "standardized industry practices" facilitating collusion, including "standard price lists and contracts" using "similar, if not identical, language and terms"; (viii) "proprietary diagnostic and service tools" and individualized designs that locked-in allocated customers; (ix) use of "nominally independent names" by defendants' subsidiaries to conceal their affiliations from allocated customers; and (x) antitrust investigations by the European Commission and Italian Antitrust Authority resulting in fines of nearly EUR 10 million for same anticompetitive conduct. *See* Second Cons. Am. Compl., *In re Elevator Antitrust Litig.*, 04-CV-01178 at ¶¶ 41-70 (TPG) (Jul. 19, 2005).

at *7-*9 (N.D. Cal. Nov. 7, 2007) ("*GPU II*"). *See* Dir. Opp. at 7. A comparison of the cases is instructive. In *GPU I*, plaintiffs alleged defendants restrained trade in a duopoly by coordinating releases of new products over a four-year period. *GPU I*, 527 F.Supp.2d at 1021-22. As here, the plaintiffs argued they had shown a "historically unprecedented" change in "pricing structure" that allegedly only collusion could explain, which the court rejected in part because the complaint – again, as here – contained "scant allegations of pricing behavior that came *before* the alleged conspiracy" that would demonstrate such changes. *Id.* at 1022 (quoting *Twombly*, 127 S.Ct. at 1965 n.4). Although Judge Alsup did not dismiss the amended complaint in *GPU II*, plaintiffs had alleged extensive new facts showing, among other things, (i) a lack of *any* coordination in the release of products in the six years before the alleged conspiracy *and* after it ended, and (ii) despite having struggled previously to make profits, defendants' "profit margins grew considerably" during the alleged collusion. *GPU II*, 2007 WL 3342602, at *7-*9. By contrast, the DP-CC alleges *no* "evidentiary facts" about pricing or output decisions *before* or *after* (and virtually none during) the purported conspiracy, much less facts "plausibly" showing "complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors." *GPU II*, 2007 WL 3342602, at *5 (quoting *Twombly*, 127 S.Ct. at 1965 n.4).

Plaintiffs' cases further highlight the deficiencies in the DP-CC. (Dir. Opp. at 6.) For example, the complaint in *In re OSB Antitrust Litig.*, No. 06-826, 2007 WL 2253419 (E.D. Pa. Aug. 6, 2007), alleged detailed and extensive "evidentiary facts" showing similar "complex and historically unprecedented changes in pricing structure" explainable only by collusion. *GPU II*, 2007 WL 3342602, at *8 (quoting *Twombly*, 127 S.Ct. at 1965 n.4). The *OSB* complaint included specific allegations showing, (i) after prices for oriented strand board ("OSB") fell 40% from 1999 to 2002 to a ten-year low, (ii) they increased nearly 300% during the first nine months of 2003 and remained similarly inflated during four-year conspiracy, even though (iii) OSB cost and demand indices, which both had moved in sync with the price index for the *ten years* before the conspiracy, remained

relatively flat. Second Cons. Am. Compl., *In re OSB Antitrust Litig*, 06-CV-00826 (PSD), ¶¶ 3, 41, 47, 59 fig. 1, 94 fig. 4 (E.D. Pa. Dec. 12, 2006).[4]

II. PLAINTIFFS HAVE NOT ALLEGED FACTS PLAUSIBLY DEMONSTRATING AN ANTITRUST VIOLATION.

Plaintiffs do not seriously dispute the repeated assertions of the "ultimate fact" of an "agreement" sprinkled throughout the DP-CC lack sufficient "evidentiary facts" to provide the required "fair notice" of their claims. *Kendall*, 2008 WL 613924, at *8 n.5. Instead, plaintiffs argue only that their claims survive because the DP-CC purportedly alleges "parallel conduct plus some small measure of additional facts that supports a 'plausible' inference of concerted activity" adequate "to satisfy Rule 8." Dir. Opp. at 8. But plaintiffs nowhere address that (i) the DP-CC fails to allege even parallel conduct, or (ii) the only "evidentiary facts" alleged show only a normal pattern of competitive business cycles completely consistent with competition. Moreover, none of the "other facts" plaintiffs cite supports a "plausible" inference of conspiracy.

A. Plaintiffs Have Not Alleged Even Parallel Conduct.

Plaintiffs do not dispute the DP-CC relies almost entirely on *average* prices across markets for medium and large panels, and the only specific allegations of non-average pricing information show significant variation. MTD DP-CC at 11. Plaintiffs also do not dispute the DP-CC alleges no lockstep behavior by Defendants regarding production capacity or supply of any TFT-LCD panels. Instead, plaintiffs mischaracterize Defendants' Motion as attacking the DP-CC solely because it alleges *only* parallel conduct. Dir. Opp. at 4, 18. But misstating Defendants' position does not eliminate plaintiffs' obligation to plead

[4] Plaintiffs also cite *In re Hypodermic Products Antitrust Litig.*, No. 05-CV-1602, 2007 WL 1959225 (D.N.J. June 29, 2007) (Dir. Opp. at 6), but that case does not involve any inference of a purported horizontal conspiracy among competitors from alleged parallel conduct. Instead, the complaint alleged a *vertical* conspiracy in which a manufacturer, *inter alia*, entered into exclusionary contracts with downstream dealers *Id.* at *1-*5. Notably, the defendant did not even challenge the existence of an agreement in moving to dismiss. *Id.* at *6.

sufficient "evidentiary facts which if true, will prove" their § 1 conspiracy claim. *Kendall*, 2008 WL 613924, at *3.

Asking plaintiffs – who claim to be "direct purchasers" – to plead the minimum parallel conduct on which they purport to base their claims – *e.g.*, the prices they allegedly paid – does not ask them "to do the impossible." Dir. Opp. at 8. Indeed, if plaintiffs were actual direct purchasers of *any* panels, they should have actual transaction (and bid and ask) information for the full range of panels purchased (and not merely "average prices" for a few panel models for a limited time period). Plaintiffs' failure to allege even parallel conduct is fatal to their claims. *See In re Late Fee & Over-Time Limit Fee Litig.*, 528 F.Supp.2d 953, 962-63 (N.D. Cal. 2007) (dismissing where some defendants allegedly followed similar pricing, but others did not).

B. The Few "Evidentiary Facts" Alleged By Plaintiffs Fatally Undermine Their Conspiracy Claim.

Using *Kendall*'s terminology, plaintiffs have built their Section 1 conspiracy claim almost exclusively from bald assertions of "ultimate facts, such as conspiracy, and legal conclusions," but have "failed to plead the necessary evidentiary facts to support those conclusions." 2008 WL 613924, at *3. For example, Plaintiffs twice recite the conclusory assertion that panel markets experienced "unnatural and sustained price stability" and "increases in prices" (Dir. Opp. at 8, 15-16 (quoting DP-CC ¶ 107)), and urge the Court to accept these "ultimate facts" at face value. But doing so would ignore both the absence of any alleged "evidentiary facts" actually supporting plaintiffs' claim, *and* the "evidentiary facts" the DP-CC actually does allege, which directly contradict it.

Plaintiffs never seriously dispute that the DP-CC's factual allegations undercut their core conclusory assertions of "sustained price stability" and "increases in price." As Defendants have explained, the only "evidentiary facts" alleged demonstrate prices dropped dramatically throughout the putative class period even though demand for panels grew exponentially and the industry experienced continuous innovation. MTD DP-CC at 11-18. Similarly, although Plaintiffs repeat the conclusory statement that the alleged conspiracy

"mitigated" the "natural business cycles" (Dir. Opp. at 18), their own alleged "evidentiary facts" again demonstrate the opposite – *i.e.*, a consistent pattern of normal, competitive business cycles where periods of oversupply and steep price decline alternate with shorter intervals when demand increases, supply tightens, and prices flatten or briefly rise (MTD DP-CC at 11-18). Although plaintiffs now disparage their allegations as "counter-facts" (Dir. Opp. at 18), and complain they are inconsistent with the DP-CC's conclusory assertions (*id.* at 15-16), they cannot disown them.

Nor can Plaintiffs avoid these facts by making unsupported and incorrect statements of economic theory. For example, Plaintiffs incorrectly argue the chart following paragraph 128 of the DP-CC "*supports* the existence of a conspiracy" (Dir. Opp. at 17), despite showing a steady fall in price per square meter of panels from approximately $8,600 in 2000 to about $2,100 in early 2005. DP-CC ¶ 128. Plaintiffs complain that price and cost do not rigidly track each other in lockstep for the entire five years of data the chart displays, and assert without support that "one would expect price … and cost … to move in sync" absent collusion. Dir. Opp. at 17. The data they allege includes no information about demand, but purports only to be a crude average across all panel models and thus says nothing about price-cost relationships for any particular panel model.

Moreover, the premise is fundamentally flawed because Plaintiffs' own allegations suggest many "obvious alternative explanation[s]" consistent with lawful competition why panel price and cost might diverge. For example, it is undisputed that demand grew substantially (*see* MTD DP-CC at 12 (noting panel market grew more than 1200% from 2001 to 2005), and where "output is expanding at the same time prices are increasing, rising prices are equally consistent with growing product demand." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 237 (1993). Moreover, particularly in the context here where Plaintiffs have alleged a highly-concentrated, interdependent industry (DP-CC ¶¶ 87-89), that price and cost diverge may reflect the "rational recognition that the market structure . . . will most easily yield profits by means other than price competition." *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1299 (11th Cir. 2003). Indeed,

"oligopolistic price coordination or conscious parallelism" is a lawful and "common reaction of firms in a concentrated market" in which they "set their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions." *Brooke Group*, 509 U.S. at 227; *see also In re Late Fee*, 528 F. Supp. 2d at 964.

C. Plaintiffs' Remaining Efforts To Save Their Claim Mischaracterize Both The Law And Their Own Allegations.

Finally, Plaintiffs' attempt to save their conclusory allegations of conspiracy by combining purported factual allegations of parallel conduct not actually pled in the DP-CC with various other factors, which together they argue tend to show collusion as distinct from independent action. Plaintiffs in *Twombly* and other cases have made similar arguments to no avail, *see In re Late Fee*, 528 F.Supp.2d at 963, and plaintiffs are no more successful here.

First, citing *SRAM*, Plaintiffs argue the DP-CC alleges "defendants exchanged numerous types of sensitive competitive information, including information on price." Dir. Opp. at 11 (citing DP-CC ¶¶ 90-91, 156-69, 194.) But none of the cited paragraphs contain allegations even remotely comparable to those in *SRAM*, 2008 WL 426522, at *4-*5, where the complaint included "specific allegations of communications" between competitors regarding the subject of the alleged conspiracy. And while the paragraphs contain general allegations about various trade associations and "interrelated business ventures," such conclusory facts do not support any inference of collusion here. *GPU I*, 527 F.Supp.2d at 1023 ("Attendance at industry trade shows and events is presumed legitimate."); *see also Twombly*, 127 S.Ct. at 1966, 1971 n.12.

Second, Plaintiffs argue the DP-CC's allegations of "a concentrated market" demonstrate an industry "conducive to cartel activity," but *Twombly* itself held such allegations of an oligopolistic structure no more indicative of collusion than independent action. *See* , 127 S.Ct. at 1964-66. In fact, taken as a whole the DP-CC's allegations of market structure undermine any inference of collusion because they show a hallmark of

vigorous competition: rapidly and consistently changing market shares. *See Williamson Oil*, 346 F.3d at 1318 ("significant market share shifts during this period of alleged industry-wide collusion strongly undermines appellants' conspiracy allegations"). Here, three of the top six current manufacturers of TFT-LCD panels – AUO, CMO, and Chunghwa Picture Tubes Ltd. – did not participate in the panel markets until more than halfway through the putative class period, and of the two dominant manufacturers before the period, only one (Sharp) remains among the top five, and it is fifth. DP-CC ¶ 89.

In responding, Plaintiffs again resort to unsupported statements of economic theory. Plaintiffs erroneously assert "the entry of the Korean and Taiwanese firms into the TFT-LCD industry may have increased industry capacity says nothing to diminish the plausibility of the cartel, and in fact, is consistent with it." Dir. Opp. at 19. But the statement is contradicted by Plaintiffs' own allegations, which admit the new entrants cut prices and competed to gain market share. *See, e.g.*, DP-CC ¶¶ 104, 123. Moreover, barriers to entry, and the ability to control output (and thereby price), notably absent here, are the *sine qua non* of any functional cartel.

Third, Plaintiffs mischaracterize excerpts from a few public statements, and wrongly assert the Court may not consider any alternate interpretation. Dir. Opp. 9-11, 19-22. But *Twombly* itself rejected a "truncated" quote as indicative of collusion where the complete statement equally suggested independent action. 127 S.Ct. at 1972 n.13. For example, plaintiffs claim a 1998 Samsung presentation constituted an effort "to obtain agreement of competitors to limit production capacity" and publicly "communicat[e] … price changes." Dir. Opp. 9, 20. But the presentation at most encouraged more vigorous and smarter competition by Korean manufacturers during a broader economic downturn, and in the face of fierce competition from new entrants (Taiwanese firms), by targeting "value added technologies."

Plaintiffs also twice recycle the same misleading excerpts purportedly made by an AUO executive in late 2005 and mid-2006, virtually at the end of a purported eleven-year conspiracy. *See* Dir. Opp. at 9-10, 21-22. Plaintiffs take the first from a transcript of an

earnings call where the Taiwanese executive responds in English to an analyst's follow-up "hypothetical question" about the risk of excess inventory that could result from AUO's decision to "continue to *add* to capacity." The executive explained AUO had forecasted continued demand growth, but added (i) AUO had always sought better controls on inventory build up *(i.e.*, days item sits on shelf) to avoid significant oversupply, (ii) he believed the industry would be stronger if other manufacturers would "do[] the same thing," and (iii) only "in recent months," he had observed that some manufactures had begun to adopt a similar approach. Plaintiffs argue the Court may interpret this exchange only as "inviting cartel members to agree, or to continue to agree, to reduce capacity or increase price" (Dir. Opp. at 21), but even if that were a permissible inference (and it is not), doing so would ignore other equally, if not more, tenable explanations. Indeed, the executive's responses are merely an off-the-cuff attempt to address an analyst's persistent doubts about AUO's decision in late 2006 to invest in additional capacity, and do not invite improper collusion.[5]

The second "statement" is taken from several articles that paraphrase comments by the same AUO executive at a May 2006 conference where he discussed the impact on industry of excess inventory unwarranted by demand. One of the articles adds significant context missing from the DP-CC by reporting (i) "prices for TFT-LCD panels" had "dropped sharply . . . to almost the *same* levels as production costs" in 2006 – the final year of the purported conspiracy – and (ii) global production of panels had increased by "82 percent" in 2005 over the prior year and was expected "to shoot up" by another "43 percent" in 2006. LCD Direct 00018. The AUO executive further acknowledged that panel manufacturers historically had failed "to reduce their capacity utilization rates" even in periods of "oversupply." While Plaintiffs contend the Court must take the truncated excerpt

[5] At most, the observation that other manufacturers had also begun to control excess inventory indicates only parallel conduct, which would be an expected and entirely lawful development in a maturing, concentrated industry like plaintiffs allege here. *See Twombly*, 127 S.Ct. at 1964.

only as evidence of "securing, evidencing and bragging about agreements to restrict capacity," just as in *Twombly*, 127 S.Ct. at 1973 n.13, the statements and articles considered in full strongly support other inferences.[6]

Fifth, Plaintiffs make a final effort to avoid dismissal by pointing repeatedly to government investigations of the TFT-LCD and other technology industries, and incorrectly claiming that the mere "existence" of such investigations constitutes "a significant allegation at the pleadings stage." Dir. Opp. at 13-14. But the law in this District is to the contrary. As Judge Wilken recently held, "the existence of [a government] investigation does not support Plaintiffs' antitrust conspiracy." *SRAM*, 2008 WL 426522, at *5-6; *see also* MTD DP-CC at 22-23 (discussing cases). Moreover, that the government has also convened "a grand jury," and sought a stay of discovery to protect the secrecy of those proceedings makes no difference.

> It is unknown whether the investigation will result in indictments or nothing at all. Because of the grand jury's secrecy requirement, the scope of the investigation is pure speculation. . . .The grand jury investigation is a non-factor.

GPU I, 527 F.Supp.2d at 1024; *see also SRAM*, 2008 WL 426522, at *5-*6 (same).[7]

---

[6] Plaintiffs argue that the executive's comments persuaded CMO and Quanta Display to cut capacity. Dir. Opp. at 10 (quoting DP-CC ¶¶ 151-52). But the article on which the DP-CC relies makes clear the CMO spokesman responded only that CMO might reduce capacity utilization, but only "if the demand sagged" and other manufacturers had taken "similar steps." Such a "follow-the-leader" strategy (even if implemented) does not support an inference of conspiracy. *In re Citric Acid Litig.*, 191 F.3d 1090, 1102 (9th Cir. 1999); *see also* MTD DP-CC at 20 n.17 (citing cases). And the allegation that, in the context of merger discussions, AUO convinced Quanta to adopt similar inventory a few months before that merger closed hardly supports an inference of an industry-wide cartel predating that merger by eleven years.

[7] Plaintiffs' reliance on *In re Tableware Antitrust Litig.*, 363 F.Supp.2d 1203 (N.D. Cal. 2005), is misplaced. (*See* Dir. Opp. at 13.) While Chief Judge Walker acknowledges that a plaintiff "may surely rely on governmental investigations" to reveal and develop facts to support his or her claim, *Tableware* makes clear that an investigation, or even an "out-of-court settlement" with the government, are not themselves allegations that independently would support any claim to relief. *Tableware*, 363 F.Supp.2d at 1205 (plaintiff must "undertake his own reasonable inquiry and frame his complaint with allegations of his own design").

Claiming "unusual circumstances," Plaintiffs ask the Court to ignore these recent decisions, and consider information submitted *in camera* by the government "in determining whether *plaintiffs* have alleged sufficient facts" to state a claim. But Plaintiffs cite no authority to support this extraordinary request, and the Court should reject it. Neither Plaintiffs nor Defendants know the contents of the governments' confidential submission. Neither knows what parties, conduct, and time period, if any, it describes, or whether the submission includes allegations of any facts that would support any particular claim or defense of any particular plaintiff or defendant. Claims simply cannot be litigated on the basis of allegations not pleaded, and of which neither party has any knowledge; plaintiffs would not know what to prove, and defendants what to answer.

III. *AGC* BARS CLAIMS BASED ON FINISHED PRODUCTS CONTAINING TFT-LCD PANELS.

Those so-called "Direct" Plaintiffs who purchased only a finished product containing a TFT-LCD panel lack antitrust standing under *Assoc. Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983) ("*AGC*"). Plaintiffs' claims are based on an alleged price-fixing conspiracy among manufacturers of TFT-LCD panels. Accordingly, whether they purchased finished products with LCD screens (e.g., TVs or cell phones) from an affiliate of any such panel manufacturer or from an unrelated company, they cannot satisfy the requirements of AGC.

A. Plaintiffs' Allegations of Antitrust Injury Based on Purchases of Finished Goods Are Entirely Conclusory.

The DP-CC's claims on behalf of purchasers of finished goods must be dismissed for failure to allege antitrust injury in anything but the most conclusory terms.[8] But conclusory allegations of injury cannot withstand a motion to dismiss. *See Glenn Holly*

[8] Direct Plaintiffs do not dispute that, based on the DP-CC and court filings, at least four named plaintiffs – Andy Ciaccio d/b/a Art's TV & Appliance, CMP Consulting Services, Inc., Nathan Muchnick, Inc., and Weber's World Company – only bought finished products containing TFT-LCD screens and not raw TFT-LCD panels or modules. MTD DP-CC at 29-30.

Entm't Inc. v. Tektronix, Inc., 343 F.3d 1000, 1007 (9th Cir. 2003) ("plaintiff must adequately allege and eventually prove 'antitrust *injury*.'") (emphasis in original); *Foundation for Interior Design Educ. Research v. Savannah Coll. of Art & Design*, 244 F.3d 521, 530 (6th Cir. 2001) ("a private antitrust claim must be alleged in more than vague and conclusory terms to prevent dismissal of the complaint"); *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co.*, 854 F.2d 802, 805 (6th Cir.1988) (same). "[W]hile the plaintiff's 'facts' must be accepted as alleged, this does not automatically extend to bald assertions, subjective characterizations and legal conclusions; further, . . . 'the factual allegations must be specific enough to justify dragging a defendant past the pleading threshold.'" *DM Research, Inc. v. College of American Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999) (citations omitted) (affirming dismissal of Section 1 action for failure to state a claim because the conspiracy alleged in the complaint was conclusory and implausible). Indeed, *AGC* itself recognized the importance of "insist[ing] upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." 459 U.S. at 528 n.17.

First, Plaintiffs in their Opposition point only to a few paragraphs in the DP-CC, but none contain any non-conclusory allegations that would support a plausible inference of antitrust injury for purchasers of finished goods. *See Twombly*, 127 S. Ct. at 1964-65 (plaintiff must allege more than "labels and conclusions"). Plaintiffs cite paragraph 4, Dir. Opp. at 30, but it alleges only, "[a]s a result of defendants' unlawful conduct, plaintiffs and members of the Class paid higher prices for TFT-LCD Products than what they would have paid in a competitive market." Plaintiffs also cite paragraphs 9 through 20, Dir. Opp. at 35, but they likewise contain the same vague and conclusory assertions[9] that simply do not pass muster under *AGC, Twombly*, and other recent cases.

[9] They each state a boilerplate conclusion that each named plaintiff "purchased TFT-LCD Products directly from one or more defendants and suffered injury as a result of defendants' unlawful conduct."

The DP-CC's allegations concerning markets for TFT-LCD panels are unhelpful to the question of antitrust injury suffered by purchasers of finished goods. As explained in Defendants' Opening Brief, through the use of the artificially defined term, "TFT-LCD Products," Plaintiffs attempt to blur the distinction between raw panels and finished products containing panels – a proverbial mixing of apples and oranges – in the hope that allegations about markets for raw panels might slop over to markets for finished goods. MTD DP-CC at 28-30. In fact, their opposition does not deny that the DP-CC's allegations concerning market factors, pricing, and production concern only TFT-LCD panels, and not finished goods containing TFT-LCD panels. *Id.* at 28-29 (discussing DP-CC's allegations concerning TFT-LCD panels in paragraphs 88-89, 95-96, 100-06, 108, 111-14, 117, 120-21, 124, 127-28, 129, 133, 139-40, 142, 144-47). Thus, other than plaintiffs' "say so" there is nothing in the DP-CC to support the plausibility of their claim of antitrust injury.

Second, Plaintiffs' argument that paying supra-competitive prices to an alleged conspirator constitutes antitrust injury (Dir. Opp. at 33-37) is similarly unhelpful for plaintiffs who purchased finished goods. The requirements of antitrust injury are not simply that an anticompetitive act took place that may have tangentially impacted prices in various markets.[10] The plaintiff must be the injured entity and must have participated in the allegedly restrained market.[11] *See Glenn Holly*, 343 F.3d at 1008 ("'the party alleging the injury must be either a consumer of the alleged violator's goods or services or a competitor of the alleged violator in the restrained market.' . . . 'Consumers in the market where trade is allegedly restrained are presumptively the proper plaintiffs to allege antitrust injury.'" (citations omitted). The Ninth Circuit has recognized "market participants" in narrow

---

[10] *See AGC*, 459 U.S. at 535.

[11] "Antitrust injury is made up of four elements: (1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent. . . . In addition, we impose a fifth requirement, that the injured party be a participant in the same market as the alleged malefactors." *Glenn Holly*, 343 F.3d at 1008 (quoting *American Ad Mgmt., Inc. v. General Telephone Co. of California*, 190 F.3d at 1055, 1057 (9th Cir. 1999), *Bhan v. NME Hospitals, Inc.*, 772 F.2d 1467 (9th Cir. 1985)).

circumstances beyond consumers and competitors but still requires participation in the restrained market. *See* Section II.C., *infra*.

Simply arguing this is a *per se* case is not sufficient to satisfy *AGC*'s standing requirement. *See Big Bear Lodging Ass'n v. Snow Summit, Inc.*, 182 F.3d 1096, 1102 (9th Cir. 1999) (upholding dismissal because plaintiffs "failed to allege antitrust injury resulting from all aspects of the alleged price-fixing conspiracy"); *see also Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 986-87 (9th Cir. 2000) (no need to show market power for per se claim, but plaintiffs must be participants in the relevant market for standing). The proper question is not whether Plaintiffs have alleged a *per se* violation of the antitrust laws, but whether they have alleged in non-conclusory terms antitrust injury caused by the alleged conspiracy.

Allegations that the conspiracy fixed the prices of panels do not make plausible conclusory claims that the prices of finished goods containing panels were affected. Other than the conclusory allegation that finished goods prices were affected, DP-CC ¶ 4, there are no allegations describing how a conspiracy in markets for TFT-LCD panels caused supra-competitive prices in the disparate markets for finished goods such as televisions, cell phones, notebook computers, and other products. As the *DRAM* Court recognized, "plaintiffs who are in secondary markets in which they purchase the price-fixed product as a component, would need to allege that the secondary market sellers themselves were in an oligopoly and fixing prices, in order to demonstrate non-speculative damages." *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 516 F.Supp.2d 1072, 1092 (N.D. Cal. 2007) ("*DRAM I*") (citing *Weaver v. Cabot Corp.*, No. 03 CVS 04760, 2004 WL 3406119, at *1 (N.C.Super.Ct. Mar. 26, 2004)). Here, the DP-CC has no allegations concerning (1) whether each (or any) of the markets for finished goods are oligopolistic, (2) how many defendants also participate in markets for finished goods and which markets, (3) who are other competitors in those markets, (4) what finished products that do not contain TFT-LCD panels (*e.g.*, traditional cathode-ray tube TVs) compete in such markets, (5) how finished goods are priced in such markets, and (6) what intermediate markets are

between the markets for raw panels and each finished goods market. Other than Plaintiffs' conclusory assertion that they were injured, which this Court need not assume to be true, there are no allegations giving rise to plausible claims of antitrust injury for purchasers of finished goods.

B. Plaintiffs Do Not Participate in the TFT-LCD Panel Markets.

Applying *AGC*, the Ninth Circuit has held it is necessary that "'the injured party be a participant in the same market as the alleged malefactors.'" *American Ad Mgmt., Inc. v. General Tel. Co. of California*, 190 F.3d 1051, 1057 (9th Cir. 1999) (quoting *Bhan v. NME Hospitals, Inc.*, 772 F.2d 1467, 1470 (9th Cir. 1985)). In determining whether goods exist within the same market, "the focus is upon the reasonable interchangeability of use or the cross-elasticity of demand between" the goods in question. *Bhan*, 772 F.2d at 1470-71. "Parties whose injuries, though flowing from that which makes the defendant's conduct unlawful, are experienced in another market do not suffer antitrust injury." *American Ad Mgmt.*, 190 F.3d at 1057.

Applying those principles here, if the prices of LCD televisions or cell phones increase, people will not purchase raw TFT-LCD panels as replacements. There is simply no interchangeability or cross-elasticity of demand between a raw TFT-LCD panel and a finished product like a television, cell phone, or laptop. Plaintiffs cite four Ninth Circuit cases supposedly for the proposition that standing is "liberally allowed" even for "claims on the periphery."[12] Dir. Opp. at 35. In each, the court clearly defined the market at issue: Yellow Pages advertising (*American Ad Mgmt.*); a single anesthesia market (*Bhan*); market for labels (*Ostrofe*); and sports stadiums (*LA Mem'l Coliseum*)), and then concluded the plaintiff participated in the allegedly restrained market, even if not as a traditional

[12] *American Ad Mgmt.*, 190 F.3d at 1058; *Los Angeles Mem'l Coliseum Comm'n v. NFL*, 791 F.2d 1356, 1363 (9th Cir. 1986); *Bhan*, 772 F.2d 1467; *Ostrofe v. H.S. Crocker Co., Inc.*, 740 F.2d 739, 745-46 (9th Cir. 1984). Direct Plaintiffs' reliance on *Bhan* is particularly curious because there the Ninth Circuit identified "the crux of the matter before the court is whether nurses and physicians are participants in a single anesthesia services market or whether they each participate in their own markets." 772 F.2d at 1470. Direct Plaintiffs have assiduously sought to avoid addressing that question.

"consumer or competitor." In contrast, here Plaintiffs have not clearly defined the market or markets, have identified disparate goods (raw panels, as well as LCD televisions, cellular telephones, notebook computers, and computer monitors to name some) but have not alleged how any compete in a defined market; and have focused their allegations on markets for panels, they have not alleged how they participated in them. When the DP-CC's allegations are compared to the four Ninth Circuit cases, the deficiencies become even clearer.

Plaintiffs also fail to appreciate the holding in *DRAM II*. That case is very similar to this one: DRAM, like raw TFT-LCD panels, was alleged to have "no free-standing use and must be inserted into a device such as a computer to serve any function." *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. M 02-21486 PJH, 2008 WL 281109, at *3 (N.D. Cal. Jan. 29, 2008) ("*DRAM II*") (internal quotations omitted). Plaintiffs alleged that the DRAM and finished goods markets were "intimately connected" and could be considered "different stages of a single supply chain." *Id.* at *4. Furthermore, plaintiffs alleged 90% of the DRAM sold had been used for the finished goods plaintiffs purchased, an allegation missing here. *Id.* at *9. Plaintiffs notably omit any allegation of what percentage of raw panels went into finished products sold by Defendants, and what percentage were sold to manufacturers of finished goods for incorporation into third-party products. Moreover, the Court in *DRAM II* held that although alleged facts that arguably showed the raw input DRAM market and finished goods markets were sufficiently "interlinked, purchasers of finished goods were still not participating in "the same market" as purchasers of raw input *DRAM* under controlling Ninth Circuit law." *Id.* Plaintiffs respond that *DRAM* concerned indirect purchasers instead of direct purchasers, but that ignores *DRAM*'s application *AGC*.[13] The precedents from the Ninth Circuit and this

[13] Plaintiffs also misread *Tessera v. Micron Technology*, No. 2:05CV94, 2005 WL 1661106 (E.D. Tex. July 14, 2005) which permitted plaintiff to proceed as a licensor of the relevant technology in the chip market, but not as a participant in the technology market, because, "[b]eing in a subset of a market once removed from alleged anti-

(continued…)

District compel the conclusion that the DP-CC does not adequately plead participation in the allegedly restrained market.

C. Plaintiffs Fail to Satisfy the Other *AGC* Factors.

Plaintiffs' also fail to address the remaining four *AGC* factors. The second *AGC* factor concerns the directness of the injury. *American Ad Mgmt.*, 190 F.3d at 1058. The DP-CC does not allege any injury was direct, and Plaintiffs address this factor in only a conclusory fashion. They argue, "as direct purchasers, Plaintiffs suffered a 'direct' harm" and there would be "no more immediate victims." Dir. Opp. at 40. This is wrong. There is an entire group of purchasers who purchased raw TFT-LCD panels directly from Defendants who, based on the allegations of the DP-CC, would have suffered more "direct harm" and be "more immediate victims" due to their participation in the allegedly restrained markets for TFT-LCD panels.

The third *AGC* factor looks at the speculative measure of the harm, and the fifth concerns the complexity in apportioning damages. *American Ad Mgmt.*, 190 F.3d at 1059-61; *Crouch v. Crompton Corp.*, Nos. 02 CVS 4375, 03 CVS 2514, 2004 WL 2414027, at *25 (N.C. Super. Ct. Oct. 28, 2004) (analyzing the two prongs together). The damages for purchasers of finished goods would be highly speculative because, as Plaintiffs admit, the panels are combined with other components in the manufacturing of finished goods. DP-CC ¶¶ 1-2. Moreover, the DP-CC contains no allegations concerning competition in the finished goods markets, which would also affect pricing of those finished goods. Plaintiffs also fail to allege how a conspiracy in any market for TFT-LCD panels might have affected prices of the finished goods purchased by Plaintiffs. In short, the *AGC* analysis shows that the DP-CC fails to plead sufficiently the antitrust standing of Plaintiffs who purchased finished goods containing TFT-LCD screens.

(…continued)
competitive behavior will not suffice to meet the high bar for antitrust standing." *Id.* at *3. Plaintiffs, however, are correct that Defendants mistakenly reversed the reference to the chip market and technology market in the opening brief.

D. AGC Standing is Analytically Distinct from *Illinois Brick* and *Sugar*.

Direct Plaintiffs' attempt to support the standing of purchasers of finished goods containing LCD screens by invoking *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), and its progeny, but that line of cases has nothing to do with antitrust standing.[14] *Illinois Brick* was not a standing case but a statutory construction case, in which the Supreme Court construed Section 4 of the Clayton Act to determine if indirect purchasers were authorized by that section to sue for federal antitrust damages. *Id.* at 728 n.7. Indeed, the Supreme Court made explicit that its decision did not address the issue of standing:

> we do not address the standing issue, except to note, . . . that the question of which persons have been injured by an illegal overcharge for purposes of § 4 is analytically distinct from the question which persons have sustained injuries too remote to give them standing to sue for damages under § 4.

Id.; *see also California v. ARC America Corp.*, 490 U.S. 93, 102-03 (1989) ("As we made clear in *Illinois Brick*, the issue before the Court in both that case and in *Hanover Shoe* was strictly a question of statutory interpretation – what was the proper construction of § 4 of the Clayton Act.").[15] That Plaintiffs might arguably be within Section 4's damages remedy does not resolve whether they have adequately alleged a sufficient "antitrust injury" to support standing under the Ninth Circuit's AGC principles. If they "have sustained injuries

---

[14] Plaintiffs claim that Defendants "concede" that they are "direct purchasers," whose claims are not barred by *Illinois Brick*. Dir. Opp. at 31 n.14. That is wrong. Defendants referred to "plaintiffs' alleged status as direct purchasers under *Illinois Brick*," pointed out that the *AGC* standing motion is analytically distinct from that issue, and do not concede that issue. Def. Dir. Br. at 25 n.21. The *Illinois Brick* issue is a matter as to which Direct Plaintiffs bear the burden of pleading and proof, and may be raised at any time by a defendant. *See Glen Holly*, 343 F.3d at 1014 n.5 ("It is true of course, that an antitrust cause of action is susceptible of dismissal at any stage once it does appear factually that the injury complained of was not antitrust in nature.") Defendants have not yet even answered the DP-CC and cannot have waived such defense. Direct Plaintiffs are also wrong to draw any inference from a defendant having not yet filed a joinder in the motion filed by Tatung Company of America, Inc. (which is not even being heard until September 2008)

[15] The Courts of Appeals have recognized that Illinois Brick is not a standing case but a statutory construction of Section 4's damages remedy. *Kloth v. Microsoft Corp.*, 444 F.3d 312, 323-24 (4th Cir. 2006) (stating that although courts "sometimes blend" *Illinois Brick*'s indirect purchaser rule and *AGC*'s standing analysis, they are "'analytically distinct,'" quoting *AGC*); *Loeb Industries, Inc. v. Sumitomo Corp.*, 306 F.3d 469, 475 (7th Cir. 2002) (finding that certain of plaintiffs' claims were barred under *AGC*, but not *Illinois Brick*).

too remote to give them standing to sue for damages under § 4," then the Court should dismiss their claims notwithstanding their alleged status as direct purchasers. *Illinois Brick*, 431 U.S. at 728 n.7.

The lower court cases cited by Plaintiffs apply *Illinois Brick*, and do not answer the issues raised by Defendants' *AGC* motion. For example, *In re Sugar Indus. Antitrust Litig.*, 579 F.2d 13 (3d Cir. 1978), was decided five years before *AGC* and obviously does not consider the legal issue presented here of *AGC* providing a separate basis for dismissing a remote direct purchaser claim. *Id.* at 16 (describing the *Illinois Brick* issue as "the question in this case"). Similarly, *In re Linerboard Antitrust Litig.*, 305 F.3d 145 (3d Cir. 2002), only concerns the effect of Illinois Brick on the claims and class certification involving purchasers of corrugated sheets or boxes (which are made out of linerboard), and AGC standing was not raised. Id. at 158-60 (describing issue as whether class certification should have been denied "under the teachings of *Illinois Brick*"). Plaintiffs also cite *General Refractories Co. v. Stone Container Corp.*, Nos. 98 C 3543, 98 C 4612, 98 C 4659, 1999 WL 14498, at *3 (N.D. Ill. Jan. 8, 1999), but that is another case where the Court only considered a challenge to direct purchasers of corrugated sheets under Illinois Brick and did not address *AGC* standing. Finally, *Royal Printing Co. v. Kimberly Clark Corp.*, 621 F.2d 323 (9th Cir. 1980), did not address standing (and also pre-dated *AGC*), and only held that *Illinois Brick* did not bar claims by purchasers of paper product who bought from subsidiaries of defendant paper product manufacturers (but did bar claims where independent middleman made the sales). *Id.* at 326 & n.6.[16]

In addition to these inapposite cases, Plaintiffs spin a conclusory economic theory as to why vertically integrated manufacturers could supposedly succeed in "increase[ing] costs

[16] Plaintiffs cite *Paper Sys. v. Nippon Paper Indus. Co.*, 281 F.3d 629, 632 (7th Cir. 2002), for its statement that "the first buyer from a conspirator is the right party to sue," but read in context this is unremarkable and of no help to plaintiffs. It is made in the course of summarizing *Hanover Shoe* and *Illinois Brick* and the court's holding that plaintiffs who resold the restrained paper products could still sue for damages under *Hanover Shoe*. And once again, *AGC* standing was not raised.

to any actual or potential downstream buyers by raising the price of the input." Dir. Op. at 37. Of course, this story appears nowhere in the DP-CC, and is not supported with any case citations. In espousing this "pass-on" theory, plaintiffs now seem to admit that there are at least two markets (downstream and upstream), but do not address the obvious fact that there are many markets. It is not plausible to suggest that 50-inch LCD televisions are in the same market (and reasonably interchangeable) with cell phones or with notebook computers, or that any of those finished products are in the same market with raw TFT-LCD panels. MTD DP-CC at 31-32. Also, this "pass-on" theory is inconsistent with the Supreme Court's conclusions supporting its rulings in *Illinois Brick* and *Hanover Shoe* that measuring overcharges passed on to other markets is complex and fraught with difficulties, the economists' "drastic simplifications generally must be abandoned," "[o]vercharged direct purchasers often sell in imperfectly competitive markets," "often compete with other sellers that have not been subject to the overcharge," and "pricing policies often cannot be explained solely by the convenient assumption of profit maximization." 431 U.S. at 742; *see* 392 U.S. at 491-93. Plaintiffs' economic arguments, while raising issues not ripe for decision on a motion to dismiss, do demonstrate the speculative nature of damages for purchasers of finished goods containing LCD screens and support the *AGC* motion.

IV. The Statute of Limitations Bars Plaintiffs' Claims Before December 12, 2002, and Plaintiffs Fail To Meet the Requirements for Tolling.

Plaintiffs cannot avoid application of the statute of limitations. Due diligence is required "when facts exist that would excite the inquiry of a reasonable person." *Conmar Corp. v. Mitsui & Co. (U.S.A.), Inc.*, 858 F.2d 499, 504 (9th Cir. 1988).[17] Plaintiffs do not

[17] Plaintiffs err in conflating constructive and inquiry notice. A plaintiff is on constructive notice if such facts exist that he should have been aware of his claim. Inquiry notice is a lower threshold – it requires only that there was enough information that the plaintiff should have looked into whether he had a claim. A plaintiff on inquiry notice has a duty to diligently investigate whether he has a claim. *See Ogle v. Salamatof Native Ass'n, Inc.*, 906 F.Supp. 1321, 1326 (D. Alaska 1995). If the plaintiff is on inquiry notice and does not investigate his claim, then the statute is not tolled.

deny that they did not conduct any acts of diligence or that the supposed "facts" alleged in the DP-CC are all based on information publicly available to Plaintiffs throughout the period of the alleged conspiracy. *See* Pl.'s Opp. 42-45. Under such circumstances, Plaintiffs cannot reasonably contend the very same facts that they now argue are more than sufficient under the exacting standards of *Twombly* (and demonstrate a plausible conspiracy) are at the same time not sufficient to have put them on inquiry notice. Accordingly, dismissal of the time-barred claims is appropriate at the motion to dismiss stage. *See Rutledge v. Boston Woven Hose & Rubber Co.*, 576 F.2d 248, 249-50 (9th Cir. 1978).

Plaintiffs' reliance on *Conmar* is misplaced. There the plaintiff sued for alleged dumping of PC-strand steel products "more than four years after the activities that form[ed] the basis for its complaint . . . , but contend[ed] that fraudulent concealment" tolled the statute of limitations. *Conmar*, 858 F.2d at 502. The information available to Conmar provided few if any hints of its claims. *Id.* at 503 (noting the public information "contained no reference to [defendant-competitor] VSL . . . or PC-strand"). Because the Ninth Circuit found "a genuine issue of material fact whether the facts publicly available" should have excited Conmar's inquiry, the court did not reach the issue of whether Conmar properly pleaded diligence. *Id.* at 504-05.

In contrast, in this case Plaintiffs glean the facts that Plaintiffs now contend state a claim from the very same news articles available to them throughout the alleged conspiracy. As *Conmar* makes explicit, in cases such as this, a court can conclude as a matter of law that sufficient facts exist to trigger inquiry notice. *Id.* at 503.[18] For example, the *Pocahontas* court held that a plaintiff was on notice of defendants' alleged conspiracy because the "structural interrelationship between the corporate defendants was necessarily

[18] Citing *Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1417 (9th Cir. 1987); *Rutledge*, 576 F.2d at 250; *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 218 (4th Cir. 1987); *United Klans of America v. McGovern*, 621 F.2d 152, 154-55 (5th Cir. 1980); *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975).

discoverable upon simple inquiry and consultation of public records . . . ." 828 F.2d at 218. Under such circumstances, a plaintiff must "state facts showing his due diligence in trying to uncover the facts." *Rutledge*, 576 F.2d at 250.

Indeed, none of the cases Plaintiffs cite involve circumstances similar to those here – where the plaintiffs expressly rely on the prior news articles for the facts on which they base their claims years later. While Plaintiffs may not have been "under a duty continually to scout around to uncover claims which they have no reason to suspect they might have," *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 782 F. Supp. 487, 498 (C.D. Cal. 1992), they did have a duty at least to inquire into the same facts they now rely upon in their complaint as evidence of their underlying claim. They cannot ignore those facts and sit on their claims for years.

CONCLUSION

For all the foregoing reasons, the Direct Plaintiffs' consolidated complaint should be dismissed.

Dated: April 3, 2008

PILLSBURY WINTHROP SHAW PITTMAN LLP
ALBERT J. BORO, JR.
FUSAE NARA
TARA M. DESAUTELS
RYAN G. KRIGER

By: */s/ Albert J. Boro, Jr.*
Albert J. Boro, Jr.

Albert J. Boro, Jr. (State Bar No. 126657)
50 Fremont Street
San Francisco, CA 94105
Telephone: (415) 983-1000
Facsimile: (415) 983-1200

Attorneys for Defendants Sharp Corporation and Sharp Electronics Corporation

SEDGWICK, DETERT, MORAN & ARNOLD LLP

By: */s/ Christopher A. Nedeau*
Christopher A. Nedeau

Michael Healy (State Bar No. 95098)
One Market Plaza
Steuart Tower, 8th Floor
San Francisco, CA 94105
Tel: (415) 781-7900
Fax: (415) 781-2635

Attorneys for Defendant AU Optronics Corporation America

WILMER CUTLER PICKERING HALE AND DORR LLP

By: */s/ Steven F. Cherry*
Steven F. Cherry

Steven F. Cherry (pro hac vice)
1875 Pennsylvania Avenue NW
Washington, DC 20006
Tel: (202) 663-6000
Fax: (202) 663-6363

Attorneys for Defendants Chi Mei Optoelectronics USA, Inc., CMO Japan Co., Ltd., and Nexgen Mediatech U.S.A., Inc.

PAUL, HASTINGS, JANOFSKY & WALKER LLP

By: */s/ Kevin C. McCann*
Kevin C. McCann

Kevin C. McCann (State Bar No. 120874)
55 Second Street, 24th Floor
San Francisco, CA 94105
Tel: (415) 856-7000
Fax: (415) 856-7100

Attorneys for Defendant Epson Electronics America, Inc.

MORGAN, LEWIS & BOCKIUS LLP

By: */s/ Kent M. Roger*
Kent M. Roger

Kent M. Roger (State Bar No. 95987)
One Market
Spear Street Tower
San Francisco, CA 94105
Tel.: (415) 442-1140
Fax: (415) 442-1001

Attorneys for Defendants Hitachi Electronic Devices (USA), Inc., Hitachi, Ltd., Hitachi Displays, Ltd., and IPS Alpha Technology, Ltd.

SULLIVAN & CROMWELL LLP

By: */s/ Brendan P. Cullen*
Brendan P. Cullen

Brendan P. Cullen (State Bar No. 194057)
Sullivan & Cromwell LLP
1870 Embarcadero Road
Palo Alto, CA 94303
Tel: (650) 461-5600
Fax: (650) 461-5700

Garrard R. Beeney (NY Reg. No. 1656172)
Sullivan & Cromwell LLP
125 Broad Street
New York, NY 10004
Tel.: (212) 558-4000
Fax: (212) 558-3588

Attorneys for Defendant Koninklijke Philips Electronics N.V.

With the Reservation of All Rights and Defenses.

SIDLEY AUSTIN LLP

By: */s/ Samuel R. Miller*
Samuel R. Miller

Samuel R. Miller (State Bar No. 66871)
555 California Street, Suite 2000
San Francisco, CA 94104
Tel: (415) 772-1200
Fax: (415) 772-7400

Attorneys for Defendants LG Electronics USA, Inc. and LG Electronics, Inc.

CLEARY GOTTLIEB STEEN & HAMILTON LLP

By: */s/ Michael R. Lazerwitz*
Michael R. Lazerwitz

Michael R. Lazerwitz (pro hac vice)
2000 Pennsylvania Avenue NW
Washington, DC 20006
Tel.: (202) 974-1500
Fax: (202) 974-1999

Attorneys for Defendants LG.Philips LCD America, Inc. and LG.Philips LCD Co., Ltd.

DUANE MORRIS LLP

By: */s/ George D. Niespolo*
George D. Niespolo

George D. Niespolo (State Bar No. 72107)
One Market Street
Spear Tower, 20th Floor
San Francisco, CA 94105
Tel.: (415) 957-3013
Fax: (415) 957-3001

Attorneys for Defendants NEC Electronics America, Inc. and NEC LCD Technologies, Ltd.

SHEPPARD MULLIN RICHTER & HAMPTON LLP

By: */s/ James L. McGinnis*
James L. McGinnis

James L. McGinnis (State Bar No. 95788)
4 Embarcadero Center, 17th Floor
San Francisco, CA 94111-4109
Tel: (415) 434-9100
Fax: (415) 434-3947

Attorneys for Defendants Samsung Electronics America, Inc., Samsung Semiconductor, Inc. and Samsung Electronics Co., Ltd.

BAKER & McKENZIE LLP

By: */s/ Bruce H. Jackson*
Bruce H. Jackson

Bruce H. Jackson (State Bar No. 98118)
Two Embarcadero Center, 11th Floor
San Francisco, CA 94111
Tel: (415) 576-3027
Fax: (415) 576-3099

Attorneys for Defendant Tatung Company of America, Inc.

WHITE & CASE LLP

By: */s/ Wayne A. Cross*
Wayne A. Cross

Wayne A. Cross (pro hac vice)
1155 Avenue of the Americas
New York, NY 10036
Tel: (212) 819-8200
Fax: (212) 354-8113

Attorneys for Defendants Toshiba America Electronic Components, Inc., Toshiba America Information Systems, Inc., Toshiba Corporation, and Toshiba Matsushita Display Technology Co., Ltd.

With the Reservation of All Rights and Defenses.

Pursuant to General Order 45, Part X-B, the filer attests that concurrence in the filing of this document has been obtained from Michael Healy; Steven F. Cherry; Kevin C. McCann; Kent M. Roger; Brendan P. Cullen; Samuel R. Miller; Michael R. Lazerwitz; George D. Niespolo; James L. McGinnis; Bruce H. Jackson; and Wayne Cross.